In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 300

VINCENT W. HALLINAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 304-315) is reported at 182 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1950 (R. 315) and a petition for rehearing was denied on July 13, 1950 (R. 316). On August 3, 1950, Mr. Chief Justice Vinson entered an order extending the time for filing a petition for a writ of certiorari to and including

September 11, 1950 (R. 316), and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction of contempt of court.

2. Whether the district court acted within the powers granted by 18 U.S.C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure when it punished petitioner's contemptuous conduct summarily.

STATUTES AND RULE INVOLVED

Sections 401 and 402 of Title 18, United States Code, provide in pertinent part:

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 402. Criminal contempts

* * * * *

> This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 42(a) of the Federal Rules of Criminal Procedure provides:

> Rule 42. Criminal Contempt.
>
> (a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On November 22, 1949, pursuant to 18 U.S.C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure, *supra,* petitioner Vincent W. Hallinan was summarily adjudged in contempt of court by District Judge Harris of the District Court for the Northern District of California, and was sentenced to six months' imprisonment (R. 283, 30). On appeal to the Court of Appeals for

the Ninth Circuit, the judgment of conviction was affirmed (R. 315). The circumstances attending the imposition of the contempt judgment may be briefly summarized as follows:

Petitioner was the trial attorney for Harry R. Bridges in a criminal prosecution for perjury and conspiracy brought against Bridges and two co-defendants.[1] The contempt judgment was based on petitioner's conduct and utterances during his opening statement to the jury and his cross-examination of the first government witness, one Garner (see R. 235-258). Petitioner's opening statement to the jury (R. 58-70, 91-114) was begun on Thursday afternoon, November 17, 1949 (R. 48), immediately following the Government's opening statement (R. 50-57), and was concluded on Friday morning, November 18th (R. 89, 91-114). His cross-examination of Garner occupied most of the afternoon of Monday, November 21st (R. 187, 189-218).[2] Just before adjournment on that day, Judge

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[1] The indictment (see R. 51-54) was in three counts. Count 1 charged Bridges and his codefendants, Schmidt and Robertson, with having conspired to defraud the United States in its naturalization functions by having Bridges fraudulently obtain naturalization by falsely swearing that he had never belonged to the Communist Party (R. 51-52). Count 2 charged Bridges with having perjured himself in the naturalization proceeding by falsely denying under oath that he had ever been a Communist (R. 52-53). Count 3 charged Schmidt and Robertson as aiders and abettors of Bridges (R. 53-54).

[2] Garner was the naturalization examiner who represented the United States in Bridges' naturalization proceeding. His direct examination (R. 115-131) and his cross-examination by Mr. MacInnis, counsel for Bridges' codefendants (R. 131-

Harris stated to petitioner, "Counsel, you have guided your own destiny pretty well with respect to what you have done thus far. * * * I have tried to make the ruling[s], but unfortunately you have seen fit to depart from them, consistently and persistently. I think we will meet at 9:30 [tomorrow morning] and discuss the matter" (R. 233).

At 9:30 a.m. on Tuesday, November 22d, Judge Harris and counsel convened in the absence of the jury (R. 233) and the following occurred (R. 234-235):

> The Court: * * * the Court has been concerned about the events of recent days, and in particular I refer to the course of conduct of Mr. Vincent Hallinan representing the defendant Mr. Harry Bridges. The record of the events which I am about to refer to presents a series of acts of misbehavior on the part of Vincent Hallinan which, if allowed to continue without comment on my part or official judicial action, might well disrupt the orderly processes of this trial. * * *
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> * * * In addition, Mr. Vincent Hallinan, by his studied, persistent and inflammatory course

186), consumed the balance of Friday, November 18th, and the morning of Monday, November 21st. Following petitioner's cross-examination of Garner, which consumed most of the afternoon of Monday, November 21st (R. 187, 189-218), Garner was briefly reexamined on direct (R. 219) and re-cross-examined by Mr. MacInnis (R. 220-221). Direct examination of the Government's second witness, one Schumacher, occupied the balance of that Monday afternoon (R. 224-231).

of conduct in flouting the authority and orders of the Court has attempted to impair the effectiveness of this Court as an instrument of the judicial process. That he was wilfully attempting to evade the rulings and orders of the Court is manifest from the record of the proceedings of the trial, all of which occurred in my presence.

Yesterday afternoon, Monday, November 21st, it became quite apparent to the Court that Vincent Hallinan would, unless prevented by prompt and firm judicial action, run unbridled and roughshod in the further progress of this trial. I was prompted then and there to make the order and findings which I am now about to make. However, to the end that I review coldly and dispassionately the transcript in the more pleasant environment of my chambers rather than attempt precipitous conduct, I read and reread and studied the transcript of the Court's proceedings from the very inception of the trial until the close of the proceedings, and I so read until the very early morning hours.

As I read and continued to read, coldly, dispassionately, my path became clearer and the course of my judicial conduct became manifest. The primary obligation imposed upon this Court or any Court worthy of the name is to maintain the orderly processes of the law and the due and proper administration of justice. * * *

* * * If I permitted this matter to go on unheeded, it would, in my opinion, represent a tragic commentary on our system, orderly as

> it is, in the administration of justice. My present task is not a pleasant one, and I approach it with a degree of care and a detached judicial aloofness.
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> Accordingly, to the end that there shall be no mistake hereafter in the record concerning my views and the conclusions I reach, I shall review the record as the basis for an order and certificate of contempt required under * * * Title 18, Section 401, subsection 1 and Rule 42, of the Rules of Criminal Procedure.

Judge Harris then proceeded to review orally the record of petitioner's opening statement to the jury (R. 235-246) and his cross-examination of government witness Garner (R. 246-258), pointing out, by page-and-line references,[3] many instances in which petitioner had violated and evaded rulings of the court. It would be impractical, in a brief in opposition to certiorari, to attempt to summarize all such instances. Nor do we think it necessary to do so, especially in view of the fact that the opinion of the Court of Appeals (see R. 305-313) summarizes the instances at considerable length. We think it sufficient at this point to relate, in its context, one of the instances of studied and contemptuous violation by petitioner of court rulings. It occurs in the course of his cross-examina-

[3] The page-and-line references made by Judge Harris were, of course, to the original typewritten transcript of petitioner's opening statement and cross-examination of Garner. The page-references of the original transcript are preserved in the printed record before this Court through the bracketed folio-page numbers appearing throughout.

tion of the witness Garner. Judge Harris had earlier ruled that the prior deportation proceedings against Bridges (one before Honorable James M. Landis and the other before Honorable Charles B. Sears), the second of which culminated in this Court's decision in *Bridges* v. *Wixon,* 326 U.S. 135, were irrelevant to the instant perjury trial of Bridges, and therefore could not be gone into by counsel (R. 168; see also R. 205-208). Despite this ruling, the record of petitioner's cross-examination of Garner reveals the following (R. 208-213):

> Q. Now, Mr. Garner, I suppose it would be a fair conclusion that if you did not read all the decision of the Supreme Court, at least you read most of it, is that right?
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> Mr. Donohue [government counsel]: I object, if Your Honor pleases. That question is——
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> Mr. Hallinan: It is preliminary.
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> Mr. Donohue: —not in conformity with the ruling which Your Honor made just a few minutes ago.
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> The Court: The objection is sustained.
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> Mr. Hallinan:
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> Q. Now, did you read that portion of the decision of the Supreme Court of the United States which charged the federal agents with illegal wire-tapping of Harry Bridges?
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> Mr. Donohue: I object to the question, if Your Honor please.

Mr. Hallinan: This goes to his participation.

The Court: The objection is sustained that it is not in conformity with the ruling, Mr. Hallinan, and is an attempt to bring before the jury matters in obviation of my ruling. I admonish the jury to disregard any implications in the question.

Mr. Hallinan:

Q. Have you any independent knowledge —now, aside from any designation of any court—have you any independent knowledge of your own or information from any person in the government's employ that at any time during the course of this proceeding or of the previous—We will withdraw that—the course of this proceeding, any wire-tapping was done on Harry Bridges' telephone?

* * * * *

A. I have no knowledge of any wire-tapping in this case.

Q. This case. In other words, it is now your testimony that you have received no information at all from within the government, employees or agents, that is, as regards this case, that is, the case that we are now trying,—Harry Bridges' wires were tapped, is that right?

A. That's right. I have no such information or knowledge.

Q. Have you information that around the time that he was admitted to citizenship, that is, shortly prior to that time and up to the time

that he was admitted to citizenship his wires were so tapped?

Mr. Donohue: I object, if Your Honor please.

The Court: Sustained.

Mr. Hallinan:

Q. You have information, however, that in each of the two previous deportation matters—

Mr. Paisley [co-counsel for the Government]: Your Honor, that is obviously——

Mr. Hallinan: Pardon me; permit me to finish my question.

Mr. Paisley: I know what your question was.

Mr. Hallinan: Well, you haven't any right to anticipate that.

Q. Mr. Witness, would you answer this question:—

Mr. Hallinan: I think I am permitted to finish my question without interruption by counsel. Here counsel is saying that he can guess into my mind——

Mr. Paisley: No guesswork, Your Honor.

Mr. Hallinan: If he would, he would blush.

Q. Now, I want to ask this question: You do have information that the government indulged in illegal wire-tapping upon the two previous——

Mr. Paisley: Just a moment, counsel.

Q. (Continuing)—two previous deportation proceedings, have you not?

Mr. Paisley: If Your Honor please, if this is not contempt of court, I have never seen it in my career.

Mr. Hallinan: That is the first time I have ever heard counsel make a statement,—I ask the jury be admonished—

The Court: The objection is sustained, the jury is admonished to disregard any implications contained in the question. I have heretofore——

Mr. Hallinan: I have asked Your Honor to ask the jury to disregard the statement that counsel just made. It is a highly improper statement.

The Court: The statement made by counsel may well be within the realm of his province to make. I shall not instruct the jury to disregard his statement.

Mr. Hallinan: We enter an exception, if the Court please.

The Court: And I say to you, Mr. Hallinan, your persistent conduct along this line, studied as it appears to be, may well eventuate in the situation that counsel refers to.

Mr. Hallinan: We enter an exception to that statement of the Court and ask that the jury be instructed to ignore it.

The Court: The objection is overruled.

Mr. Hallinan: Very well.

Q. Now, did you yourself, in the period preceding, that is, looking toward, the deportation of Harry Bridges, and during that time—

not at the present—receive any information from any federal officer or agency that Harry Bridges' wires were being illegally tapped?

Mr. Donohue: I object to the question, if Your Honor please.

The Court: Sustained.

Mr. Hallinan:

Q. Have you at any time throughout the origin of the proceedings against Harry Bridges, that is, back in 1937 or '8 up to the present time, that is, up to today, made any protest of any kind to any agent of the government or any attorney of the government that there was or had been illegal wire-tapping of Harry Bridges?

Mr. Donohue: I object, if Your Honor pleases.

The Court: Sustained.

Mr. Hallinan:

Q. Did you at any time in the course of your connection with this case state to any official or agent of the government that you would not be a party to an illegal effort to injure this man?

Mr. Donohue: I object to the question, if Your Honor please, and I again ask Your Honor to admonish counsel to confine his cross examination to that well established rule of law to which Your Honor invited his attention just a few moments ago.

The Court: The objection is sustained.

Mr. Hallinan: Very well.

Q. In your study, whatever study you did make, of the Landis decision, you learned that 62 witnesses had been presented by the government against Harry Bridges and that Dean Landis had rejected all of them as liars and perjurers, didn't you find that out?

Mr. Donohue: I object to the question and again state to Your Honor that Mr. Hallinan's deliberate and repeated questions, which he knows as a lawyer are beyond the scope of that limitation defined by Your Honor, is highly contemptuous of the decision of this Court.

Mr. Hallinan: Your Honor, that is a highly improper statement for counsel to make, and that puts the defendant and his counsel in an invidious light with the jury. Now, we have the right to ask that question. I am entitled to inquire into this gentleman's mind and what his attitude is toward such findings and such statements as that.

The Court: The objection is sustained, Mr. Hallinan.

Mr. Hallinan: And I might ask you this, Your Honor——

The Court: It is an attempt to circumvent the ruling of this Court and place before this jury by indirection matters that have been ruled out, matters that are immaterial, that are irrelevant.

Mr. Hallinan: Your Honor, we have had no ruling upon any such question as that at all. There has been nothing said in that matter.

The Court: We spent, before the recess period, at least 45 minutes in discussion.

Mr. Hallinan: What it amounts to, Your Honor, is rendering it almost impossible to find out—This witness has now a shield of objections thrown around him that prevents the defense from finding out what his real interest in the case is.

The Court: That observation is uncalled for, unwarranted, purely gratuitous, and part of a studied plan.

Mr. Hallinan: Now I ask that Your Honor —Pardon me. I enter an objection to that statement and I ask that the jury be instructed to ignore it.

The Court: The objection is not well taken.

Mr. Hallinan: And I except to the Court's refusal to so instruct the jury.

Q. Now, getting away from these two proceedings that seem to involve me in so much criticism, you do know this, that 60 witnesses, different from those that testified before Landis, testified before Sears and that Sears rejected all but one of them as liars and perjurers; isn't that right, Mr. Witness?

Mr. Donohue: I again object—

Etc., etc.[4]

Following his oral review of petitioner's contemptuous conduct, Judge Harris adjudged petitioner in contempt and sentenced him to six

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[4] The incident, or series of incidents, contained in the quoted portions of the record was discussed by Judge Harris in his oral review of petitioner's conduct at R. 250-253, and by the Court of Appeals at R. 312.

months' imprisonment (R. 283, 30).[5] He subsequently filed a formal contempt certificate, pursuant to Rule 42(a), F. R. Crim. P. (*supra*, p. 3). This certificate reads (R. 30-31):

> In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for criminal contempt was committed in my presence and was seen and heard by me during sessions of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:
>
> Beginning on the 17th day of November, 1949, and continuing up to and including the 21st day of November, 1949, the events hereinafter recited, and annotated by me, took place in the courtroom.
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> [This was followed by a *verbatim* repetition of that part of the *Bridges* record in which Judge Harris orally reviewed petitioner's contumacious conduct (see p. 7, *supra*), and which, consequently, is not reproduced in the printed record.]
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> Certified this 22nd day of November, 1949 at San Francisco, California.
>
> (Signed) George B. Harris, United States District Judge.

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[5] Judge Harris also ordered that petitioner's name "be stricken from the roll of lawyers of this federal court" (R. 283), but subsequently, following an extended colloquy among counsel (R. 283-297), in staying the execution of the contempt sentence (R. 297), Judge Harris rescinded this order (*ibid.*) in order to permit petitioner to continue to act as Bridges' counsel at the perjury trial (R. 296-297), pursuant to Bridges' request (R. 288-289).

ARGUMENT

1. Petitioner contends that his conduct at the trial was not in fact contumacious (Pet. 7-31). He attempts to demonstrate, in a sentence-by-sentence analysis of that portion of the opinion of the Court of Appeals in which the court reviewed and summarized the instances of misconduct on petitioner's part as reflected by the record, that the most that the record shows is that he persistently made statements, asked questions, and adopted tactics, which the trial judge was of the *opinion* were improper, but that he never actually evaded or violated any *explicit ruling* of the judge. The contention is without merit.

It would be unprofitable to attempt to refute, incident by incident, petitioner's present contention. Judge Harris' certificate, which incorporates in its entirety his oral review of the instances of contumacious conduct (R. 235-258; see pp. 15, 7, *supra*), makes it clear that in instance after instance petitioner violated explicit rulings of the court. That this is true appears plainly from the excerpt from the transcript of the cross-examination of Garner which is quoted at length in the Statement, *supra,* at pp. 8-14. The cumulative effect of the incidents as a whole caused Judge Harris to find that (R. 234)—

> * * * Mr. Vincent Hallinan, by his studied, persistent and inflammatory course of conduct in *flouting the authority and orders of the Court* has attempted to impair the effective-

> ness of this Court as an instrument of the judicial process. That he was wilfully attempting to evade *the rulings and orders of the Court* is manifest from the record of the proceedings of the trial, all of which occurred in my presence. [Italics supplied.]

This finding by the judge who was on the scene and personally witnessed the "studied" (R. 236, 240, 247, 256), "persistent" (R. 240, 249, 256), and "unbridled" (R. 238, 239) course of conduct of petitioner—conduct wholly lacking in "good faith" (R. 247-248, 249, 253, 254), "not bordering on contempt, but contemptuous in every form and degree" (R. 256)—is of course entitled to great weight in appraising the adequacy of the evidence to support the contempt judgment.

The instant contention is simply an attack on the sufficiency of the evidence to sustain a criminal conviction for contempt. Two courts have reviewed the evidence and found it amply sufficient to sustain the conviction. Under these circumstances, there is no occasion, we submit, for this Court to reexamine that evidence. *Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590.[6]

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[6] Petitioner puts his evidentiary argument in several different forms. Thus, his argument that the contempt judgment violates the "right of counsel clause of the Sixth Amendment" (Pet. 31, 35-52) assumes that he kept within the lawful limits of advocacy in all that he did at the trial in representing his client. But the trial court found that he

2. There is no conflict, as petitioner claims (Pet. 32, 62-63), between the decision below and *Sprinkle* v. *Davis*, 111 F. 2d 925, 930 (C.A. 4). The *Sprinkle* case involved a civil suit for damages for injuries sustained in an automobile accident. The case was tried twice. At the second trial, the defendant's counsel offered in evidence a page of the record of the first trial for the purpose of showing that the plaintiff's counsel had on that occasion made a certain admission, relevant to the case, which was inconsistent with the plaintiff's testimony at the second trial. The trial judge excluded the evidence, remarking that he "had explained a half dozen times that the record of the previous trial could be referred to only to show that a witness had then given testimony different from that offered by him at the second trial." The judge "charged defendant's counsel with constant breaches of the rule, and declared that he would impose a fine upon them if the practice continued." On appeal by the defendant from an adverse judgment, the Court of Appeals said: "This statement [by the trial judge] was improper and highly prejudicial. Even if it be conceded that the

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went far beyond those lawful limits in persistently evading and violating court rulings. Similarly, the argument that the Court of Appeals accorded petitioner "a hearing in form only and not a hearing in substance" (Pet. 31, 53-57) is based on the assumption that the Court of Appeals "accept[ed] the accusations of the [trial judge's] certificate as true where the record conclusively shows that they are false" (Pet. 31, 53). But, as we have pointed out, the record shows nothing of the kind.

offered evidence was inadmissible, counsel were nevertheless entitled to offer it *in good faith*, free from threat of punishment by the court. Actions taken by counsel during the course of trial under a mistaken view of the law do not constitute contempt of court; *and a careful examination of the record convinces us that there was no such perseverance by defendant's counsel in a mistaken point of view contrary to the rulings of the court as to constitute improper conduct on their part*" [italics supplied]. It was this very "perseverance * * * in a mistaken point of view contrary to the rulings of the court," found lacking by the Court of Appeals in the *Sprinkle* case, which both courts below in the instant case found to have been present, and to have been so persistent and wilful as to constitute contempt.

3. Several of petitioner's contentions (Pet. 57-60, 60-62) are but different aspects of a single argument—that some of the trial court's rulings, for persistent violation of which petitioner was held in contempt, were incorrect as a matter of law. But, without conceding such to have been the case, the short answer to the argument is that made by the Court of Appeals (R. 313):

> Appellant extensively argues the general propriety of bringing in the defenses disclosed by the above related questioning. The vice

> found here is not in bringing in the defenses but the manner in which it was attempted to be accomplished. All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial Court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere. * * *

See also *Fisher* v. *Pace,* 336 U.S. 155, 162.

The Court of Appeals also adequately disposed of the related argument of petitioner—that, under previous Ninth Circuit decisions, "the cross-examiner had an insufficient record on appeal if he desisted after objection was sustained to his first question on a subject on cross-examination. He *should have asked further questions* and made an offer of proof" (Pet. 64-65; italics in the original). The Court of Appeals pointed out, immediately following the above-quoted language (R. 313):

> * * * But, argues appellant, before the alleged error can be considered elsewhere, the record must be sufficiently explicit to enable a reviewing court to understand the nature and purpose of the excluded evidence. With this statement we are in entire agreement but are unable to find in the record before us justification for the conduct of appellant on that ground. We think appellant went far beyond

> the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made long before appellant desisted.

The justice of this observation of the Court of Appeals is fully borne out, we submit, by the passage from the transcript of petitioner's cross-examination of Garner which we have quoted in the Statement, *supra,* at pp. 8-14.

4. Petitioner's contention that the trial court lost its power to punish him summarily for contempt by failing to impose sentence immediately upon the occurrence of the contemptuous conduct (Pet. 32-33, 67-70) is also without merit. The decided cases "are all to the general effect that the punishment should follow the acts of contempt with reasonable promptitude, but that the degree of promptitude depends upon the particular facts of each case, and that the punishment need not follow immediately if such an imposition would endanger the defense in a criminal case, or interfere with its conduct." *United States* v. *Sacher,* 182 F. 2d 416, 429 (C.A. 2, opinion of A. N. Hand, J.), petition for a writ of certiorari pending, No. 201; see also *O'Malley* v. *United States,* 128 F. 2d 676, 684 (C.A. 8), reversed on another ground *sub nom. Pendergast* v. *United States,* 317 U.S. 412; *In re Maury,* 205 Fed. 626, 631-632 (C.A. 9);

In re Grossman, 109 Cal. App. 625, 631-632; *Middlebrook* v. *State,* 43 Conn. 257, 268-269; *In re Cary,* 165 Minn. 203, 204-205; *In re Willis,* 94 Wash. 180, 184-185.

Even in *Ex parte Terry,* 128 U.S. 289, upon which Rule 42 (a), *supra,* p. 3, is based,[7] the obstruction to the court's business was terminated and the reading of the court's opinion was completed before steps were taken summarily to punish Terry for his contempt.[8] If petitioner's view were sound, this Court would have been required to grant the writ of habeas corpus to Terry on the ground that the lower court lacked power to punish him summarily for misconduct which was not a pending obstruction at the time the court acted. True, in the *Terry* case, the court acted on the same day on which the contemptuous conduct occurred, whereas here the trial judge sentenced petitioner on Tuesday morning for a contemptuous course of conduct which had extended over the preceding Thursday, Friday, and Monday. But, as Judge Frank observed in his concurring opinion the *Sacher* case, *supra,* 182 F. 2d at 457:

> * * * I fail to understand how the shortness, in Terry's case, of the interval between misconduct and punishment can support [Sacher's argument that the trial judge de-

[7] See Advisory Committee's note.

[8] See the detailed facts as set forth in the report of the case in the lower court, *In re Terry,* 36 Fed. 419, 420 (C.C. D. Cal.), and as reviewed in Circuit Judge Frank's concurring opinion in the *Sacher* case, *supra,* 182 F. 2d at 457.

> layed too long in imposing summary punishment by waiting till *the end of the trial;* contrast the instant case]. For that shortness cannot alter the basic fact that, in Terry's case, the summary punishment could not conceivably tend to prevent anyone from interfering with the orderly progress of the very case in which the improper interference took place. * * *[9]

Furthermore, petitioner's statement that *"Ex parte Terry,* 128 U.S. 289, 314, expressly left the question open whether summary proceedings could be used 'at a subsequent term or subsequent day of the same term' " (Pet. 68) is not an accurate statement of the question which that decision reserved. The question reserved was "Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order [Terry's] arrest and imprisonment for the contempt, *without first causing him to be brought into its presence, or without making reasonable efforts by rule or attach-*

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[9] Compare *In re Maury, supra,* 205 Fed. at 631-632: "We cannot agree with the contention of the plaintiff in error that the court below erred in waiting until the next day before proceeding to pass judgment upon him.

* * * * *

"We are of the opinion that the rule laid down in the case of Terry is entirely applicable to the case before this court. Obviously there can be no distinction between delaying until later in the same day, and delaying until the next day, before making an order adjudging an offender guilty of contempt of court; jurisdiction of the person of the offender having attached instantly upon the contempt being committed in the presence of the court."

ment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned" (128 U.S. at 314, italics supplied). Here, petitioner was present at the imposition of sentence, had every opportunity to be heard, and was in fact heard (see R. 258-262).

The essence of the power to punish summarily consists in the fact that the misbehavior has been committed in the very presence of the court. It is the personal witnessing by the court of the contemptuous conduct which gives rise to the summary jurisdiction. That jurisdiction attaches at the instant the contempt is committed, and reasonable delay in imposing punishment does not deprive the court of the power to proceed summarily. This Court made that point clear when it said, in the *Terry* case, *supra,* 128 U.S. at 311:

> * * * Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment. * * *

This being so, it matters not whether the court acts instantly upon the commission of the contempt or awaits a more propitious time at which to act. Here, Judge Harris, though "prompted then and there [i.e., on the preceding day, during petition-

er's cross-examination of Garner] to" hold petitioner in contempt, decided to "review coldly and dispassionately the transcript in the more pleasant environment of my chambers," rather than "attempt precipitous conduct" in the heat of the temper and impatience which petitioner's conduct had engendered (R. 234). It is difficult to see how petitioner could have been in anywise prejudiced by the restraint thus exercised by the judge. Rather, it was to his benefit, since action taken after calm reflection is notoriously more likely to be just than action taken in the heat of passion.

Significantly, Rule 42(a) imposes no requirement of instantaneous action as a condition of summary punishment. It simply provides that "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Both conditions were fulfilled here.

Equally without merit is petitioner's argument that there was no jurisdiction to proceed against him summarily because, he asserts, the trial judge "certified only that defendant's actions *'if allowed to continue without comment* on my part or official judicial action, *might well disrupt* the orderly processes of this trial'" (Pet. 67). In the first place, only a jaundiced eye could read the trial judge's certificate and his comments incorporated therein and yet conclude that there is no finding of

a present or imminent "disruption of orderly processes" which petitioner seems to deem essential (Pet. 67-70). The trial court found that by his "studied, persistent and inflammatory course of conduct in flouting the authority and orders of the Court [petitioner] has attempted to impair the effectiveness of this Court as an instrument of the judicial process." (R. 234). It can hardly be seriously suggested that a court's summary contempt powers are inadequate to deal with a course of conduct so motivated and that the "disruption" that must be worked must have been so complete as to make continuation of the trial impossible.

Moreover, 18 U.S.C. 401 grants to a "court of the United States * * * power to punish * * * such contempt of its authority * * * as— * * * (3) Disobedience or resistance to its lawful writ, process, *order, rule,* decree, or *command.*" [Italics supplied]. See *supra,* p. 2. There can be no question that the trial court found "disobedience or resistance" to its orders and that finding, without more, is sufficient basis for its summary judgment of contempt. If present or imminent disruption is a condition on the exercise of the court's summary contempt power, Congress can be taken to have decided the obvious proposition, in 18 U.S.C. 401 (3) itself, that disobedience or resistance to a court order is, *per se,* disruption or obstruction of the judicial process.[10]

[10] The remaining contentions of petitioner do not, in our view, require extended discussion. Conceding, *arguendo,* that

CONCLUSION

The judgment below is correct and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1950.

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the Court of Appeals had the power to reduce the sentence (see Pet. 70-71), it certainly was not required to do so, and there is no showing that the trial judge abused his discretion in imposing a six-month sentence, particularly in view of the flagrancy of petitioner's contemptuous conduct. That the Court of Appeals referred in its opinion to the fact that petitioner had twice previously been convicted of contempt in California state courts (see Pet. 71; R. 315) obviously does not impinge upon the rule that evidence of prior offenses is, with certain well-recognized exceptions, inadmissible at a jury trial of charges arising out of a different, unconnected offense. Finally, there is no need to consider the contention that a court may not, as an incident of a summary contempt judgment, summarily order the name of an attorney to be stricken from the roll of attorneys entitled to practice before it (see Pet. 71), since, as we have pointed out (*supra*, p. 15, note 5), and as petitioner acknowledges, this aspect of the court's order was rescinded, and was not included in the judgment appealed from.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 917687 350

MOTION FILED
MAR 24 1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 300

VINCENT HALLINAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR LEAVE TO FILE SECOND PETITION FOR A REHEARING AND SECOND PETITION FOR A REHEARING.

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WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR LEAVE TO FILE SECOND PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Vincent Hallinan respectfully asks leave to file a second petition for rehearing after denial of his petition for certiorari in the above entitled case. The Court of Appeals, deciding petitioner's case at 182 F. (2d) 880, based one point upon the Second Circuit decision in *Sacher v. U. S.*, 182 F. (2d) 416 (182 F. (2d) 882, 887). Subsequent to petitioner's petition for rehearing this Court granted a rehearing and a writ of certiorari in *Sacher v. U. S.*, 20 U.S.L.W. 4180. On March 10, 1952, it decided that case on the merits (20 U.S.L.W.

4180) and on the same day denied the petition for rehearing in petitioner Hallinan's case. The decision in petitioner's case was evidently treated as dependent on the decision in *Sacher v. U. S.* (the original petitions for certiorari in both cases had likewise been denied on the same day—June 4, 1951). Both counsel for petitioner Hallinan and counsel for the petitioners in *Sacher v. U. S.* believe that the opinion in *Sacher v. U. S.*, 20 L.W. 4180 contains statements which can and should be made the subject of a petition for rehearing. (The petitioners in *Sacher v. U. S.* may petition for rehearing as a matter of right.) *Sacher v. U. S.* by its own language is a decision of first impression; it construes for the first time the respective limits of Rules of Criminal Procedure 42(a) and 42(b). The language of the opinion also leads to the inference that the Court decided this question squarely contrary to all available historical evidence as to the intended effect of the sections. For those reasons, the present holding should be reviewed; petitioner's case being directly affected by the new *Sacher* holding, he should be permitted to present his arguments on the subject.

Petitioner accordingly asks leave of this Honorable Court to file the attached second petition for rehearing and to have the same considered on its merits.

Dated, San Francisco, California,
March 19, 1952.

GEORGE OLSHAUSEN,
Attorney for Petitioner,
Vincent Hallinan.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 300

VINCENT HALLINAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

SECOND PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I. FACTS.

Before discussing legal issues we wish to correct an apparent misapprehension of fact regarding petitioner Hallinan's case.

Justice Frankfurter, dissenting in *Sacher v. U. S.* has the following to say about *Hallinan v. U. S.* (20 L. W. 4180, 4191):

"The complained of conduct did not at all bring the judge personally into the controversy."

It may reasonably be inferred that other members of the Court share this impression.

On the contrary, the following excerpts from the record show that the trial judge felt himself to be personally in a conflict with defendant Hallinan. (Hallinan had filed an affidavit of disqualification on basis of litigation in which he and the judge had been involved before the judge was on the bench. R. 34-7.)

(Emphasis added throughout.)

(R. 234):

"The Court. * * * In addition, Mr. Vincent Hallinan, by his studied, persistent and inflammatory course of conduct in flouting the authority and orders of the Court *has attempted to impair the effectiveness* of this court as an *instrument of the judicial process.* * * *"

(R. 235):

"However there is an anomaly apparent throughout the country today and exemplified perhaps in some of our more recent trials, in that *those who cry so earnestly for protection under the mantle and cloak of our Constitution of the United States would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system.* * * *"

(*Note.* This is said respecting *an attorney before the court!* The judge virtually accuses Hallinan of trying to overthrow the Government in the Courtroom.)

(R. 250):

"The Court. * * * Mr. Paisley [one of the prosecutors]—mildly, Southern drawl, temperate * * *"

(R. 253):

"The Court [referring to Hallinan's complaint that his cross-examination was being unduly restricted]. That observation is uncalled for, unwarranted, purely gratuitous and a *part of a studied plan.*

* * * * * * *"

(R. 254):

"At page 748, again in my quest for good faith, *again naively,* I thought I might find it some place."

(R. 256):

"And page 754 *Mr. Hallinan, dissembling with the court, seeking to justify a non-existent reason for his course of studied conduct,* seeking to jettison the witness."

(R. 257):

"The Court. * * * After *Mr. Hallinan's wheedling and somewhat dissembling,* said he wanted a ruling from me. He now wanted a ruling. We have now reached page 755 and he was asking me to rule. * * *"

(R. 257):

"* * * Page 755, line 19, Mr. Paisley again, I suppose somewhat amazed with reference to our western type of practice."

(R. 259):

"Mr. Hallinan. Very well, then your Honor. I want to make this motion and objection on it, and this is the proper time to do it. I want to ask the Court first to disqualify himself from proceeding further upon this matter.

Now, your Honor will understand that we have two elements involved in a matter of this kind. One is the defendants whom we represent in the matter, and the other is my personal self. And of course, this motion now applies to the matter relating to my personal self. And under the circumstances, of course, your Honor should not make a finding upon the matter and should not make any certificate of any judgment. But your Honor should take the matters that you have read off, and which I assure you do not constitute contempt in any part, and transfer it to another judge, for the reason,—and if your Honor will not concede this and stipulate it, then I will ask to be sworn and make a formal motion of the matter —that within the last three years your Honor appeared as a witness in a case in which I was sued by your close and intimate friend, Eugene Aureguy, in which he sued me for the sum of $10,000. And your Honor will remember you appeared in the Superior Court as a witness and testified in his behalf. And your Honor will also remember that prior to that time you endeavored privately in your chambers, as a justice in the city courts, to persuade me to deliver Mr. Aureguy $10,000 which he claimed.

The Court. *That is false and untrue.*"

(R. 281):

"The Court. * * * And I say to you, Vincent Hallinan, you, your colleague, Mr. MacInnis—an able young fellow, a man of ability—that you would have had no trouble in this case, but you saw fit to take the reins, ride rough-shod over my orders, impugn the integrity of the Court. I say no more. I think you know in your own heart, your own conscience, as you stand there, that everything you have said this morning is false, untrue, unfair, and scurrilous. Man to man, in an alley or in a courtroom, you couldn't look me in the eye and say that.

Mr. Hallinan. Let me put it—Let me file an affidavit making the charge, and charge me with perjury, sir.

The Court. You will not file the affidavit.

Mr. Hallinan. Then we will try it out.

The Court. You will not file any affidavit before me, Mr. Vincent Hallinan.

(R. 287):

"The Court. Mr. Paisley, may I address myself to you? You have participated in some rather outstanding trials, including the United States v. May; the Congressman, the Garsson trial; I do not know whether you had any participation in the more recent trial in New York before Judge Medina, but I feel that you are a pretty temperate fellow. I have seen you in court here. We are dealing with a brother lawyer. In effect, we are all lawyers. How do you feel toward the situation?

Mr. Paisley. Your Honor, I have never seen any such performance as this in my life. Your

> Honor has indicated that you have never seen any such contemptuous conduct in a courtroom. I daresay no appellate court will ever receive such a record as this. ***Mr. Hallinan—I will not refer to him as counsel—I will not prostitute the word by using it in relation to this matter.*** He has desecrated this temple of justice.
>
> * * * * * * *
>
> The Court. * * * Mr. Paisley, ***thank you very much.***"

The foregoing passages from the record show distinctly that "the complained of conduct *did* * * * bring the judge personally into controversy". The case presents the same problem as *Sacher v. U. S.*

II. SACHER v. U.S. INTERPRETS RULES OF CRIMINAL PROCEDURE 42(a) AND 42(b) FOR THE FIRST TIME AND CONTRARY TO THE PROBABLE INTENT OF THE FRAMERS.

A. Preliminary statement.

In *Sacher v. U. S.* the grant of certiorari was limited to the question:

> "Was the charge of contempt, as and when certified, one which the accusing judge was authorized under Rule 42(a) to determine or punish himself; or was it one to be adjudged and punished under Rule 42(b) only by a judge other than the accusing one, and after notice, hearing, and opportunity to defend."

The question whether the *Sacher* petitioners were guilty of contempt was excluded from review. It is

therefore beside the point and illogical for the Court to quote the Court of Appeals' opinions as to how heinous the *Sacher* petitioners' contempt supposedly was. (20 L.W. 4180 at 4180.)

B. The opinion interprets Rule 42(a) as enlarging previous power to punish for summary contempt.

1. The Rules of Criminal Procedure went into effect March 21, 1946. (See Rules of Criminal Procedure, Fed. Code Ann. p. 3.) At that time the language of this Court was to the effect that the power to punish summarily for contempt should be confined to the narrowest limits of necessity. (*Anderson Dunn* (1821) 19 U.S. (6 Wheat.) 204, 230-31. *Cooke v. U. S.* (1925), 267 U.S. 517, 536; *In re Michael* (1945), 326 U.S. 224; also *Nye v. U. S.* (1941), 313 U.S. 33, 52, overruling *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402; *In re Oliver* (1948), 333 U.S. 257, 274 follows *Cooke v. U. S.*, supra.)

2. (a) This Court in *Sacher v. U. S.* says that it is concerned with Rule 42(a), not with any decisions preceding it. The opinion further says that Rule 42(a) has virtually no legislative history:

(20 L. W. 4180, 4180-91):

> "Rule 42 obviously was intended to make more explicit: 'the prevailing usages at law' by which the statute has authorized punishment of contempts. * * * No legislative history sheds light on this issue. * * * Cases prior to it (Rule 42) grew out of facts so distinguishing that their decisions are of little value as precedents."

(b) *Sacher v. U. S.* also says (20 L. W. 4180, 4181):

> "But the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. * * *"

(20 L. W. 4182):

> "* * * The purpose of that [adversary] procedure is to inform the court the course of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence."

To say that the *knowledge* of the trial judge is the distinguishing feature between summary (42(a)) and adversary (42(b)) proceedings goes directly contrary to the language of *Cooke v. U. S.*, 267 U.S. 517, 536:

> "We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice', as Blackstone has it, is not *instantly suppressed and punished,* demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment constituting the due process that the assumption that the court saw everything that went on in open court was required to justify the ex-

ception; but the need for the immediate penal vindication of the dignity of the court created it."

Since this is a formulation of underlying theory before application to specific instances, the fact that "it grew out of facts so distinguishing" (20 L. W. 4180, 4181) is of minimum importance.

The statement of underlying theory in the present case is almost diametrically contrary to the statement of underlying theory in the *Cooke* case. So far as *Sacher v. U. S.* rejects the limitations of *Cooke,* it gives Rule 42(a) a broader scope than that of summary procedure as understood before the rule was enacted.

(c) As indicated, *Sacher v. U. S.* says rule 42(a) has virtually no legislative history (20 L.W. 4180, 4181):

"No legislative history sheds light on this issue."

Such dearth gives all the more point to what little legislative history as may be found. The only historical data seem to be the code Advisory Committee's Notes (8A F.C.A. p. 30):

"*Note to subdivision* (a) This rule is substantially a restatement of existing law.

Ex parte Terry, 128 U.S. 289; *Cooke v. U.S.,* 267 U.S. 517, 534."

"Note to Subdivision (b).

* * * * * * *

"The provision in the sixth sentence disqualifying the judge affected by the contempt if the

charge involves disrespect to or criticism of him is based in part on 29 USC 112 (contempts, demand for retirement of judge sitting in proceeding) and the observations of Chief Justice Taft in Cooke v. US, 267 US 517, 539."

While these notes refer to pages 534 and 539 of the *Cooke* opinion rather than to page 536, they clearly show that the advisory committee had *Cooke v. U. S.*, 267 U.S. 517 in mind when it drafted the rules. It certainly must have accepted Chief Justice Taft's formulation of underlying theory.

The present opinion does not accept Chief Justice Taft's formulation of the limits of summary contempt. In short, it not only enlarges those limits as previously understood, but it does so in the face of the only historical evidence which seems to be available—the advisory committee's notes. A construction of a rule which is on its face without historical support and goes against the only historical evidence available should be reconsidered before being made a precedent.

III. "NECESSITY" PRINCIPLE PLACES HALLINAN CASE WITHIN RULE 42(b).

If the test of "necessity" is accepted as fixing the limits of summary contempt, *Hallinan v. U. S.* was properly a matter to be prosecuted with notice and hearing under Rule 42(b).

How limited is the "necessity" for summary contempt proceedings may be seen from the practice of

the federal commissions. They do not exercise the power to punish directly at all. Compare *Interstate Commerce Comm. v. Brimson* (1894), 154 U.S. 447. We have found no record of any exercise of power to punish directly by any federal commission. While the substance of their decisions may be legislative (*Prentiss v. Atlantic Coastline R. R.*, 211 U.S. 210) their procedure is judicial. Yet they have managed to function for the last sixty years without exercising any power of summary contempt.

Conceding that such necessity may at times exist, its narrow scope is defined by the Court's own analysis. It is said (20 L.W. 4181-2):

> "The rule in question contemplates that occasions may arise where the trial judge must immediately arrest any conduct of such nature that *its continuance would break up a trial*, so it gives him power to do so summarily.
>
> * * * * * * *
>
> The procedure on which petitioners now insist is just the procedure most likely to achieve the only discernible purpose of the court conduct. Had the trial judge pursued that course, they could have made a formidable assertion that it was unfair to them or to their clients and that a new trial was required on account of it."

Yet if the rule is intended to *operate immediately*, on conduct which would otherwise *"break up the trial"* it certainly contemplates that *punishment* should be imposed immediately. (Cf. *Cooke v. U.S.*, 267 U.S. 517, 536, quoted supra.) An assignment of misconduct would be good only if the contempt holding were un-

justified. To allow punishment to be postponed reduces the immediate effect of the sentence to that of a mere admonition. Certainly the filing of a criminal complaint against the lawyer (to be tried before another judge) has the effect of an admonition. It was Samuel Johnson who said:

> "Yes, sir, but it is painful to be forced to defend it. Consider, Sir, how should you like, though conscious of your innocence, to be tried before a jury for a capital crime, once a week."
>
> *Boswell's Johnson* (Glover ed. 1901), Vol. 2, pp. 230-31.

The difference between the admonition of a complaint under 42(b) and the admonition of postponed punishment under 42(a) is that in the former case the defendant gets a fair trial and in the latter he gets no trial. If he is guilty (but his conduct does not threaten to "break up the trial") he will presumably be found guilty under 42(b). If he is not guilty, a summary finding of guilt under 42(a) with punishment postponed can serve nothing but to create gratuitous hostility between Court and counsel. It is not the admonition of postponed punishment but actual punishment on the spot which characterizes a 42(a) proceeding. Perhaps *Ex Parte Terry,* 128 U.S. 289—drawing a knife on the marshal in the courtroom—is the best example of an incident which calls for the exercise of such power. But where immediate punishment is not required, there is no occasion or necessity for immediately pronouncing sentence without a hearing. If, as *Cooke v. U. S.,* 267 U.S. 517, indicates,

necessity alone authorizes summary contempt procedure, then, where immediate punishment is not required, condemnation without a hearing is not permitted.

In *Hallinan v. U. S.,* the pronouncement of sentence was delayed until a later day. The infliction of punishment was delayed until the end of the trial. Pending trial the summary finding of guilt was an admonition and nothing more, but it was an admonition in the form of a judgment without notice or hearing. We submit sacrificing so much (i.e. notice and hearing) for so little (an admonition) was not the purpose of Rule 42(a). The Court should review its holding that the rule extends beyond cases which require immediate forceful intervention. It should accordingly grant rehearings in this case and in the *Sacher* case.

Dated, San Francisco, California,
March 19, 1952.

Respectfully submitted,
GEORGE OLSHAUSEN,
Attorney for Petitioner,
Vincent Hallinan.

CERTIFICATE OF COUNSEL.

I certify that I consider the foregoing petition for a rehearing well taken in law; that the same is not filed for delay, and that it is confined to matters authorized by Rule 33(2) of this Court.

Dated, San Francisco, California,
March 19, 1952.

GEORGE OLSHAUSEN,
Attorney for Petitioner,
Vincent Hallinan.